Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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NO. 81-102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

OTIS M. BAY and CHARLES H. BEAN
Petitioners,

v.

GOODYEAR TIRE AND RUBBER COMPANY
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether promotional systems based entirely on subjective opinions and evaluations without any safeguards are entitled to protection under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.?

(2) Whether the Court may arbitrarily exclude employment decisions made during any portion of the liability period?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Chief Justice and Associate Justices Of The Supreme Court Of The United States:

Otis M. Bay and Charles H. Bean, by their attorney, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit filed February 18, 1981.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court dated April 14, 1980 in favor of Goodyear Tire and Rubber Company, is printed at AA-1, *infra,*

and reported at 23 EPD ¶ 30,903 (April 14, 1980). The judgment of the Court of Appeals for the Fifth Circuit, affirming the District Court, is printed at B-1, *infra* and it not officially reported.

JURISDICTION

The date of the Judgment of the Fifth Circuit Court of Appeals sought to be reviewed is February 18, 1981 which is also the date of entry. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

(1) Title VII of the Civil Rights Act of 1964, Title 42 United States Code, Section 2000e et seq., the pertinent portion of which is as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
> >
> > (2) to limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

(2) Civil Rights Act of 1866, Title 42 United States Code, Section 1981, the pertinent portion of which is as follows:

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . .

STATEMENT OF THE CASE

This case involves a suit challenging the promotional policies and practices of the Respondent GOODYEAR TIRE AND RUBBER COMPANY'S Houston facility, whose policies of promotion involve the utilization of subjective criteria and evaluations which have resulted in the exclusion of blacks in supervisory positions at all times prior to November 1, 1971. Further, the subjective criteria utilized have resulted in the demotion of blacks from supervisory to hourly positions in disproportionate numbers as compared to the demotion of white employees. The action was filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended, and 42 U.S.C. § 1981, the Civil Rights Act of 1866.

Respondent's Houston facility is engaged in the manufacture of synthetic rubber. The facility is divided into different departments which provide differing services and functions for the maintenance of the entire facility.

Each department has split levels of supervision. The first level of supervision is the position of "supervisor" drawn from among the ranks of hourly employees. The second level of supervision is the position of "foreman". Above these levels are the positions of general foreman,

production superintendent or department head and finally the position of manager.

Petitioners Otis Bay and Charles Bean are employees of Respondent's Houston facility. On May 7, 1970, Petitioner Bay filed a Charge of Discrimination with the Equal Employment Opportunity Commission naming GOODYEAR TIRE AND RUBBER COMPANY as Respondent, and alleging that he had been denied supervisory positions because of his race. On April 9, 1973 Petitioner Charles Bean filed a Charge of Discrimination with the Equal Employee Opportunity Commission again naming GOODYEAR TIRE AND RUBBER COMPANY as Respondent, and alleging that he had been demoted from the position of temporary supervisor because of his race. The EEOC, after careful investigation, issued its determination on the Charges filed wherein the Commission found that there was reasonable cause to believe that Bay and Bean had been discriminated against. These determinations were made on November 8, 1971 and May 31, 1974 respectively.

The District Court certified the case as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. With respect to the Title VII claims, the class was certified as all black employees who have been, from November 8, 1969, denied supervisory positions or demoted from supervisory positions because of their race or color. With respect to the claims brought pursuant to 42 U.S.C. § 1981, the class was certified to consist of all black employees who have been from October 31, 1972, denied supervisory positions or demoted from supervisory positions because of their race or color.

Respondent's hourly workforce is the pool from which supervisors are selected. Promotions to the supervisory

level are granted based on the recommendation of the hourly employee's immediate supervisor which supervisors have historically been all white. The immediate supervisor's recommendation is based on criteria which can be characterized as subjective and have resulted in the historical exclusion of blacks from the supervisory and or management positions. Further, there are no built in safeguards within the promotional system to act as a check on the subjective criteria.

As a step to receiving a position of Supervisor, Respondent utilizes a system whereby employees eligible for promotion under the subjective criteria utilized, move from their hourly position to the position of temporary supervisor. This position acts as a sort of training ground before being awarded the full title of Supervisor. Temporary supervisors are not allowed to stay in these positions for more than six months due to the collective bargaining agreement between Respondent and the International Union of Operating Engineers, which is the labor union for the production department (the largest of the departments). By staying in the position for one day over six months the employee looses his accumulated seniority on a daily basis—that is, for every day spent as a temporary supervisor over six months, the employee looses a day of seniority in his collective bargaining unit.

Petitioner Charles H. Bean was employed by Respondent on February 9, 1966, and assigned the position of Baler Helper in the Production Department (Department 1300). Approximately three (3) years later he was promoted to the position of Operator. On or about September 26, 1972, he was selected for a temporary supervisor position in the Production Department, a

salaried position. On or about March 26, 1973, he was demoted to the position of Finishing Area Relief Operator, an hourly position. While occupying the position of temporary supervisor, Petitioner Bean was never formally instructed as to his duties and management refused to support him in his efforts to function as a temporary supervisor when Petitioner Bean was faced with insubordination from white employees whom he supervised. Petitioner Bean was never promoted to the position of permanent supervisor under the subjective promotional system utilized by Respondent.

Petitioner Otis M. Bay was initially employed by Respondent in September of 1965 and assigned to a Storeroom Clerk position. As a storeroom clerk he primarily drove a Forklift in the Department called 1400 or Warehouse and Shipping Department. In 1968, Petitioner Bay worked as a supervisor for the second shift in the Box Factory. His immediate supervisor was William Chaffin. Mr. Chaffin informed all other employees on Bay's Shift that they were to answer to Mr. Bay, whose duties were generally to direct the Shift on which he worked including issuing job assignments and recording the boxes made and materials utilized in the process. Mr. Bay never received supervisory pay.

During the relevant time period, Petitioner Bay was passed over for a permanent supervisory position in the Box Factory. The promotions granted were awarded to white employees who had no work experience in the Box Factory. Petitioner Bay was never awarded a supervisory position because of the subjective criteria utilized by Respondent in awarding promotions to the level of Supervisor.

Petitioners were never awarded supervisory positions because the scheme of promotional policies utilized by Respondent acts to deny qualified black employees an equal employment opportunity and hence the opportunity to become permanent supervisors or move into other management positions.

On March 3-7, 10-11 and 21, 1980, the case was tried to the District Court without a jury. Subsequently, the District Court entered Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure. The Court ultimately held that neither Bay and Bean nor the class they represented had been discriminated against by GOODYEAR because of their race.

Bay and Bean appealed the decision to the United States Court of Appeals for the Fifth Circuit. On February 18, 1981, the Fifth Circuit entered its opinion affirming the decision reached by the District Court.

ARGUMENT I

Both the District Court and the Court of Appeals have reached an erroneous conclusion as to the protected promotional systems under Title VII, of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Petitioners have sought to impress upon both Courts that promotional systems based primarily on the subjective opinions and evaluations of an all white supervisory staff are not entitled to protection under Title VII of the Act of Congress known as the Civil Rights Act of 1964. *Rowe v. General Motors Corporation*, 457 F.2d 348 (5th Cir. 1972). Further, the Fifth Circuit Court of Appeals has wholly ignored the area of law on subjective promotional

systems which it has delineated as being clearly unlawful under the Act.

When promotional systems have been upheld which utilize and are based upon wholly subjective criteria, these systems have been protected only because they contain built in safeguards to act as a check upon the injection of unlawful bias in according promotions. *Baxter v. Savannah Sugar Refining Corporation,* 495 F.2d 437 (5th Cir. 1974). Where promotional systems are utilized such as Respondents, given deference to by the lower Courts, there always remains the possibility and probability that racial bias has been injected into promotional decisions. Further, there is never any available method whereby to keep the promotional decisions in check when the system has no guidelines to objectively determine which persons are qualified to fill a particular vacancy. Petitioners urge that the result is that it becomes far too easy to exclude blacks from higher level positions without ever having to answer as to the reason for the exclusion of those promotable blacks.

Petitioners do not urge that promotional systems utilizing subjective criteria are per se prohibited but argue instead that these type systems are per se violative of Title VII when there are no built in safeguards to act as a check upon the system. By upholding the pomotional system utilized by Respondent, the lower courts have afforded Goodyear with a rubber stamp of approval to continue to discriminate against blacks in awarding promotions. Efectively, a promotional system has been approved that has no checks or guarantees that blacks will be afforded their fair share of promotions. As Petitioners have urged, the significance lies in the fact that the promotional system utilized by Respondent produces dis-

criminatory results. *Muller v. United States Steel Corporation*, 509 F.2d 923 (10th Cir. 1975). Further, Petitioners urge that failure to promote constitutes deprivation of employment opportunities. *United States v. N. C. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973). Specific intent to discriminate is not necessary. *Spurlock v. United States*, 475 F.2d 216 (10th Cir. 1972).

Petitioners would further urge that in approving the promotional system utilized by Respondent, the lower Courts have effectively approved utilization of promotion procedures that lack meaningful standards to guide the promotion decision and have deemphasized the utilization of elements assuring objectivity. Petitioners would argue that this is a violation of Title VII. Clearly, personal and subjective criteria foster discrimination.

Petitioners would further assert that an employer is under a compulsion to refrain from the utilization of vague criteria in making promotional decisions. Petitioners have sought to impress upon the lower courts the need for a significant structure in deciding which employees should be awarded promotions. Without the use of same, the employer is afforded an easy method whereby it can hide behind its discriminatory practices, policies and procedures. Esoteric standards should not be approved and held non-violative of Title VII.

Petitioners would assert that despite the fact that Respondent professes to adhere to a promotional system which considers the experience of an employee in the department in question, this does not absolve them from liability. A further problem lies in this system because a considerable portion of the evaluation still depends upon judgment of a vague and subjective nature. *Rowe v. General Motors, supra.* Respondent has never been

able to categorically delineate any other consistent objective criteria employed in making promotional decisions. Petitioners would take the position that Title VII was aimed at affording protection from such systems. *Wade v. Mississippi Cooperative Extension Service,* 372 F.Supp. 126, aff'd in relevant part, 528 F.2d 508 (5th Cir. 1978).

Petitioners would further urge that Title VII requires an employer to utilize an evaluative device which includes a fixed content and calls for discrete judgments. By according deference to the device employed by Respondent, this principle is wholly ignored. Evaluation devices of a fixed content must necessarily entail the utilization of precise written guidelines by the evaluator on those competences for which they are searching. *Brown v. Gaston County Dyeing Machine Company,* 457 F.2d 1377 (4th Cir. 1972). Petitioner's would assert that the lack of objective standards and safeguards in Respondent's promotional system is a deficiency not to be sanctioned.

Petitioners would further urge that in any promotional system, the constituent factors utilized ought to have assigned weights. *Wade v. Mississippi Cooperative Extension Service, supra.* This must necessarily entail the adoption of some procedure whereby the employee can be fully apprised of his progress as well as his deficiencies. This would afford some check on the system and act to diminish the opportunity to discriminate on the basis of race. Petitioners would assert that this was the intent of Congress in passing the Act discussed herein. Employers are not to be afforded any convenient methods of discrimination. The more checks encompassed within the system, the more insulated the procedures are from

discrimination and hence a greater protection is afforded blacks caught within the web of that system.

Petitioners would urge that in placing too great an emphasis on subjective evaluations in making employment decisions, the result is a tendency to favor the incumbent class at the expense of minorities. *Roman v. ESB, Inc.*, 550 F.2d 1343 (4th Cir. 1976); *Senter v. General Motors Corporation*, 532 F.2d 511 (6th Cir. 1976). Minorities are simply left out when promotions are granted because of the utilization of a system of this nature. The discrimination likewise can be covertly concealed. Subjective criteria and evaluations are therefore too indefinite, all to the expense of blacks and other minorities. The result of this is that blacks receive only a few of the employment opportunities that are accorded to whites as illustrated by the present case.

Petitioners would urge that it is not enough that there are some employment opportunities available to black employees, Title VII requires that there be equal employment opportunities available. *Palmer v. General Mills, Incorporated*, 513 F.2d 1040 (6th Cir. 1975). Petitioners would urge that promotional systems based on subjective criteria and evaluations foster only inequality in employment opportunities.

Petitioners would further urge that the unacceptable result of subjective promotional systems is that blacks invariably remain concentrated in lower level non management or supervisory positions as has occurred in the instant case. *Fisher v. Proctor and Gamble*, 613 F.2d 527 (5th Cir. 1980). This is exhibited by the fact that Goodyear had no black supervisors as of the time the suit was brought.[1] The promotional system utilized at

1. See Addendum.

that time is also the currently existing one. Petitioners would assert that underrepresentation in key upper level positions makes questionable the design and operation of the system employed.

Petitioners would further urge that substantially the same results occur when subjectivity is utilized in determining which individuals are to be demoted. Again the absence of objective criteria and the absence of safeguards provides too easy a means of discriminating against blacks. The decisions to demote, then, must likewise be based upon some objective measures or have built in sameguards to deter against discrimination and the injection of unlawful bias.

ARGUMENT II

Petitioners would next assert and argue that the proper focus of the Title VII litigation must necessarily be based upon decisions made during the liability period and that the employment situation existing during the period of liability controls any decision rendered by the lower Courts.

As stated herein, the case was certified as a class action in accordance with Rule 23(b)(2) of the Federal Rules of Civil Procedure. With respect to the Title VII claims, the class was defined to include all black employees who, since November 8, 1969, were denied supervisory positions or demoted from supervisory positions because of their race or color; and with respect to claims based on 42 U.S.C. § 1981, all black employees who since October 31, 1972, were denied supervisory positions or demoted from supervisory positions because of their race or color.

Critical to Petitioners position is that at the time the lawsuit was instituted, Respondent's plant had not one black supervisor. Further, since the class was certified to include employment decisions made in according supervisory positions since November 8, 1969, this date shapes the period of consideration. Thus in focusing on this period Petitioner's would argue that it is incumbent upon the lower courts to consider the employer's workforce as a whole during the appropriate period. Failure to consider the entire period affords the employer with an unfair and unwarranted advantage as in the instant case.

On November 8, 1969, Respondent had no black employees occupying any of the supervisory positions in the various departments. Similarly, in 1970, no blacks occupied a supervisory position. It is curious to note, however, that Blacks comprised 12.8% of Defendant's workforce in 1970. The first supervisory position awarded to a black occurred on November 1, 1971.[2] However, whites were promoted to supervisory positions during this time. Petitioners would therefore argue that the entire range of years encompassed within the liability period are critical. However, these two years simply were not considered by the lower Courts and the decision rendered was based upon Respondent's practices from 1972 until the date of trial.

When Respondent did seek to make changes in the existing supervisory structure, these changes were made in the wake of the pending lawsuit. This fact alone should call the practices employed by Respondent into question. Petitioners would argue that changes made in Respondent's promotional system once a lawsuit has been filed

2. See Addendum.

should not be accorded deference because such change in the face of litigation is equivocal in purpose, motive and performance. *Reed v. Arlington Hotel Company,* 476 F.2d 721 (8th Cir. 1973); *Jenkins v. United Gas Corporation,* 400 F.2d 28 (5th Cir. 1968); *Parham v. Southwestern Bell Telephone,* 433 F.2d 421 (8th Cir. 1970). To allow an employer to cover up its discriminatory practices and avoid liability for those practices earlier utilized during the liability period flies in the face of Title VII litigation.

Because of the nature of Title VII class actions these lawsuits invariably take years to get to trial. An employer can simply avoid a valid claim of employment discrimination by covering up its practices with a few promotions to deserving blacks if the decision rendered by the lower Courts is to control. Petitioners would argue that in allowing an employer to avoid liability for its discriminatory policies, the purpose and intent of Title VII can be easily thwarted. Frankly speaking, to allow an employer to avoid liability in this manner, effectively means that a Title VII litigant could never be successful with his claim of discrimination. An employer could simply grant a few promotions to blacks once a lawsuit has been filed, just as in the instant case. The employee would then never have a remedy for the discriminatory practices engaged in by the employer earlier on during the liability period before the employer attempts to ratify its discriminatory practices.

This Court has further sought to emphasize the critical need for evaluating the employment decisions made during the time frame relevant to the lawsuit. *Hazelwood v. United States,* 433 U.S. 299 (1977). The focus is on the entire period and the Court cannot pick an arbitrary point

within that period and exclude other points. The Court cannot effectively move the liability period to a period that favors the employer. In doing this, the employer gains leverage which is unjustified and can thereby escape culpability for its practices which have excluded blacks from the upper level positions. The employee is then left in a position as if he had never been the victim of any unlawful employment practices.

If an employer is allowed to pick and choose the points at which he feels it necessary to correct his employment practices, there is nothing to prohibit the employer from promoting several black employees on the eve prior to trial and escaping liability for the practices utilized during the earlier stages of the liability period. This is effectively what the lower courts have allowed. It is of no moment that Respondent began its attempt to alleviate its discriminatory practices two years after the suit had been filed or two years after the commencing of the liability period. The same effect results if the alleviation attempt is made during the last year of the liability period. Title VII was not enacted for the purpose of allowing employers to engage in makeshift coverups after employees have become disgrundled and filed suit to correct the matters. To allow this is simply inequitable. The discriminatee is never compensated for his wrong and perhaps may not be among the selected few who comprise the makeshift coverup and is left where he was before the litigation process was initiated—at the lower levels of the employers workforce.

CONCLUSION

Promotional systems based on subjective criteria are not entitled to protection under Title VII where there are

no guidelines in employing the subjective criteria and no safeguards are encompassed within the procedure to guard against racial discrimination. Systems of this nature afford employers with too easy an opportunity to discriminate and invariably result in employment opportunities which are unequal in terms. Subjectivity in the decision to demote, likewise produces a similar discriminatory result.

Further, in evaluating the employment practices utilized by an employer, the focus must be upon the existing employment situations during the entire period of liability. The liability period cannot be shifted in a manner which produces a result favorable to the employer simply because that point in time favors the employer and ratifies his earlier discriminatory practices.

Respectfully submitted,

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ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari has been mailed to the Attorney of Record for Respondent on this the 16th day of July, 1981.

GORDON R. COOPER, II

ADDENDUM 1

OFFICIAL & MANAGERS

	TOTAL	MALE	FEMALE	MALE NEGROES	MALE ORIENTAL	MALE AMERICAN INDIAN	MALE SPANISH AMERICAN	FEMALE NEGROES	FEMALE ORIENTAL	FEMALE AMERICAN INDIAN	FEMALE SPANISH AMERICAN	TOTAL NEGROES	%	TOTAL WHITES	%
1970	71	71	0	0	0	0	1	0	0	0	0	0	0%	70	98.5%
1971	74	74	0	0	0	0	1	0	0	0	0	0	0%	73	98.6%
1972	78	78	0	1	0	0	1	0	0	0	0	1	1.2%	76	97.4%
1973	76	76	0	2	0	0	2	0	0	0	0	2	2.6%	72	94.7%
1974	81	80	1	3	0	0	2	0	0	0	0	3	3.7%	76	93.8%
1975	73	72	1	2	0	0	2	0	0	0	0	2	2.7%	69	94.5%
1976															
1977	78	77	1	4	0	0	3	0	0	0	0	4	5.1%	71	91%
1978	75	74	1	4	0	0	3	0	0	0	0	4	5.3%	68	90.6%
1979	77	76	1	6	0	0	3	0	0	0	0	6	7.7%	68	88.3%

A-2

ADDENDUM 2

SUMMARY

MINORITY SUPERVISORS

Name	*Race*	*Dept.*	*Date Appointed*	*Temp. Sup. Date*
Alfonso Ortiz	M/A	1020 (Technical Laboratory)	3-01-66	
Louis Humphrey	B	1300 (Production)	11-01-71	(6-01-71)
Ruben Gonzales	M/A	3300 (Production-Winstay)	8-01-72	(3-08-72)
Albert Eatmon	B	1300 (Production)	11-06-72	(11-01-71)
Kirby Barnes, Jr.	B	1300 (Production)	*8-01-73 6-13-75	(2-06-73) (5-05-75)
Melvin Lewis	B	1020 (Technical Laboratory)	**10-01-74 7-16-75	(7-30-74)

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* On 2-16-75, Barnes moved from Production Supervisor to Dryer Operator. On 2-24-75, Barnes moved to Production Balance Operator. On 5-5-75, Barnes moved to Temporary Production Supervisor.

** On 2-16-75, Lewis moved from Lab Supervisor to Process Control Chemist.

* SOURCE: Exhibit 7 to Defendant's Answers to Plaintiffs' Interrogatories 18 & 19.

AS OF 7/1/75.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 74-H-1464

OTIS BAY and CHARLES H. BEAN,
Plaintiffs

vs.

THE GOODYEAR TIRE AND RUBBER COMPANY,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

Introduction

Plaintiffs Charles Bean and Otis Bay brought this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and under 42 U.S.C. § 1981, alleging that Defendant Goodyear Tire & Rubber Company denied them opportunities for promotion to supervisory jobs at the Houston Chemical Plant because of their race. In particular, Plaintiff Bean alleges that Defendant unlawfully refused to promote him to a permanent supervisory position in the Synthetic Rubber Production Department. Plaintiff Bay alleges that the Company unlawfully denied him supervisory promotions in the Receiving and Stores and the Warehouse and Shipping Departments.

The Court certified this case as a class action in accordance with Rule 23(b)(2) of the Federal Rules of Civil Procedure. With respect to the Title VII claims, the class has been defined to include all black employees who, since November 8, 1969, were denied supervisory positions or demoted from supervisory positions because of their race or color; and with respect to claims based on 42 U.S.C. § 1981, all black employees who since October 31, 1972, were denied supervisory positions or demoted from supervisory positions because of their race or color.

On March 3-7, 10-11 and 21, 1980 the case was tried to the Court without a jury. Pursuant to Rule 52, Fed.R.Civ.P., the Court now enters the following Findings of Fact and Conclusions of Law.

II.

Findings of Fact

A. *General Organization of The Houston Chemical Plant*

1. The Goodyear Tire & Rubber Company's Houston Chemical Plant is engaged in the manufacture and distribution of synthetic rubber and an anti-ozonant. Synthetic rubber is manufactured in the Synthetic Rubber Production Department (Department 1300) which is divided into an "A Side" (the Finishing Area) and a "B Side" (the Polymerization Area). Anti-ozonant is manufactured in the Wingstay Chemical Department (Department 3300). The Plant is also divided into several other separate departments which are organized according to the various functions performed.

2. For purposes of this case, only six departments are directly relevant: Synthetic Rubber Production (1300); Wingstay Chemical (3300); Maintenance & Engineering

(1100); Receiving & Stores (1220); Warehouse & Shipping (1400); and the Laboratory (1020). The only promotions to permanent supervisor and above from November 8, 1969 to the time of trial occurred in these six departments, the largest of which is Department 1300.

3. The first level of supervision at the Plant is "supervisor." The second level of supervision is foreman. Above foremen are the supervisory classifications of general foreman, production superintendent or department head, depending on the particular department involved, and plant manager. Vacancies in the positions of foreman and above have been rare over the past 10 years. There have, however, been 37 promotions to supervisors' jobs.

4. Promotions to vacancies for supervisor are made from among the pool of nonsupervisory employees in the department where the supervisory vacancy occurs. Promotions to vacancies for foreman-level positions are made from among the pool of supervisory employees in the department where the vacancy for foreman occurs. In filling supervisor or foreman vacancies, the Defendant has tried to select the person who appeared to be the most qualified for the vacancy when it occurred.

5. The hourly employees at the Plant are represented by seven (7) different labor unions, but the largest group of hourly employees (in the production department) are represented by the International Union of Operating Engineers, Local 347 (I.U.O.E.).

B. *Synthetic Rubber Production Department and Plaintiff Bean*

1. Plaintiff Charles Bean is a black employee at the Plant. Throughout his service with Goodyear, he has

worked only in Department 1300. He has never requested to work elsewhere, although he has the right to do so under the I.U.O.E. Labor Agreement.

Mr. Bean began work in Department 1300 as a baler/helper on February 9, 1966. After using his seniority to bid and receive several operating jobs in the finishing area of Department 1300, on September 26, 1972 Mr. Bean was selected to serve as a Temporary Production Supervisor in Department 1300 upon the recommendation of his foreman, Mid Love, and general foreman, Ben Cope. Mr. Bean served as a Temporary Production Supervisor until he was returned to the hourly workforce as a finishing area relief operator on March 26, 1973. Since March 26, 1973, Mr. Bean has continued to work in several jobs in Department 1300. Mr. Bean has never been selected for promotion to a permanent supervisory vacancy.

2. Mr. Bean's complaint of racial discrimination centers on his being returned to the hourly workforce on March 26, 1973 and his having never been promoted to a permanent supervisory job. The Defendant has denied that Mr. Bean was reduced from temporary supervision to the hourly workforce because of his race and has denied that it has failed to promote Mr. Bean to a permanent supervisory position because of his race.

3. Before discussing the facts surrounding the decision not to promote Mr. Bean to a permanent supervisory job in Department 1300, an explanation of the procedures concerning the length of time employees remain in temporary supervisory jobs is appropriate. Employees from the I.U.O.E. bargaining unit are made temporary supervisors to fill in for permanent supervisors who are absent

due to vacations or illness. Employees may remain in a temporary supervisory capacity for varying lengths of time. However, prior to July 19, 1976, employees promoted to temporary supervisory positions would retain their bargaining unit seniority to a date up to and including 6 months after the date of promotion. After 6 consecutive months in a temporary supervisory job, however, the employee would lose his entire 6 months seniority and would continue to lose bargaining-unit seniority on a day-for-day basis thereafter. Today, any employee who temporarily performs work as a supervisor for an accumulative total of 180 calendar days loses all seniority rights within the bargaining units. As a result of this contractual provision, employees were seldom retained in temporary positions beyond 6 months, because to do so would cause the employee to lose seniority in the bargaining unit and thus risk the loss of his relative position on the seniority roster.

4. While the evidence is conflicting as to how well Charles Bean performed as a temporary supervisor, one pattern appears. While acting as a temporary supervisor, he experienced several conflicts with the hourly employees whom he supervised. In each instance, Mr. Bean seems to have become upset with the support he received from his superiors and reacted very emotionally to the incidents.

First, there was the incident involving a white hourly-paid repair mechanic, Robert Wall, who accused Mr. Bean of wrongfully performing Mr. Wall's duties as a maintenance mechanic. Mr. Bean wanted Mr. Wall to be discharged, or at least disciplined, for confronting him so abruptly about the situation. Realizing he had been some-

what abrupt with Mr. Bean, Mr. Wall promptly offered to apologize, but Mr. Bean refused. In the presence of Mr. Love, Mr. Bean rejected Wall's proffered handshake. It was only after Mr. Bean returned from a two-day paid absence from work that he "made up" with Mr. Wall and accepted Mr. Wall's apology. The incident, while relatively minor, simply reveals Mr. Bean's inclination to overreact and attribute fairly minor problems to racial animosity. No other black employee who testified at trial reported any difficulty in working with or supervising Mr. Wall.

While on temporary supervision, Mr. Bean also had at least one, or perhaps two, run-ins with a white electrician named Will Chaires. In the first instance, Mr. Bean claims that Mr. Chaires threatened him over a work assignment. When Mr. Bean reported this to the production superintendent, Mr. Birdwell, Mr. Bean acknowledged that Birdwell was willing to discipline Mr. Chaires accordingly right then, but Mr. Bean decided against any disciplinary action. The second incident between Mr. Bean and Mr. Chaires concerned the electrician's refusal to reset a breaker switch on a blend tank agitator motor. The breaker had been reset several times, and when asked to do so again, Mr. Chaires refused. Mr. Bean promptly reported the refusal to his foreman, Mr. Mid Love, who, after hearing Mr. Bean's version of the problem, spoke with Mr. Chaires about the matter. Mr. Chaires claimed to Mr. Love that he thought the assignment was unsafe because the breaker switch had become hot and resetting it while overheated might risk injury to himself or damage to the equipment. Mr. Love summoned the electrical foreman, Mr. Wallace, to investigate the situation. Mr. Wallace examined the breaker switch

and agitator motor and found that it was, indeed, overheated and possibly could explode if reset before it cooled. As a result of the excuse offered by Mr. Chaires and the electrical foreman's confirmation of the potential hazard, Mr. Love decided that Mr. Chaires could not be disciplined for the refusal. The Labor Agreement with the union representing electricians, I.B.E.W., Local 716, permits employees to refuse assignments which they believe are unsafe. This same provision allowing employees to refuse assignments which they believe are unsafe is contained in the Labor Agreement with Operating Engineers Local 347, Mr. Bean's union.

Mr. Bean was dissatisfied with Mr. Chaires not being disciplined for refusing the assignment and asked that Mr. Love arrange a conference with the Director of Personnel, Mr. Fred VanOsdall. The meeting was arranged. During this meeting it was again concluded that the Company could not justify disciplining Mr. Chaires for refusing the assignment because Mr. Chaires had the right to excuse his refusal on the grounds of safety, and his foreman, Mr. Wallace, had confirmed the legitimacy of his concern. However, Mr. VanOsdall asked Mr. Love to meet with Mr. Chaires and Mr. Bean to make sure that Mr. Chaires clearly understood that he was to follow Mr. Bean's instructions unless, of course, those instructions created a safety hazard.

Subsequently, Mr. Love called Mr. Chaires and Mr. Bean into his office and told Mr. Chaires that Mr. Bean was his supervisor when Mr. Chaires worked in the finishing area and that he would have to follow Mr. Bean's orders. Mr. Chaires responded that he would do so, but warned that he would continue to refuse assignments which he thought were unsafe. Mr. Bean was

apparently offended by this response, for when asked what he thought about Chaires' statement, he replied sharply that he didn't know why Mr. Love had called "this damn meeting".

In addition to the incidents referred to above, there were other incidents between Mr. Bean and hourly production employees while Mr. Bean was on temporary supervision. Mr. Bean acknowledged an incident between him and some operators over his asking one operator to relieve another. According to Mr. Bean, a union grievance was filed against him over this incident, but was dropped. Mr. Willard Morris, another foreman, recalled another incident involving Mr. Bean and two baler helpers who were in a dispute over whether one of them had taken an extra smoke break. Mr. Bean's repeated order to one of the men to "shut up" caused tempers to escalate, and Mr. Morris intervened to resolve the squabble.

Mr. Love explained several other incidents which occurred between Mr. Bean and the hourly workers he was assigned temporarily to supervise. All of these incidents simply reflect an inability, or unwillingness, on Mr. Bean's part to use good judgment in dealing with subordinates.[1]

Mr. Morris, following the same procedure he used for all temporary supervisors asked several black and white hourly employees for their opinion of Mr. Bean as a supervisor. Mr. Morris testified that all the reports were negative (with the exception of those who simply refused comment). These hourly workers informed Mr. Morris

1. Other black supervisors did not experience the difficulties in relating to bargaining unit employees encountered by Mr. Bean.

of their view that Mr. Bean would not be a good supervisor.

Mr. Morris has also asked these same workers about other black and white temporary supervisors and received favorable reports.

5. The Court finds that Goodyear did not refuse to promote Plaintiff Bean to a permanent supervisory vacancy in favor of a less qualified white employee. First, the evidence reveals that Mr. Bean was replaced as a temporary supervisor in March, 1973 by a fellow black employee, Moses Bradford. Second, the next permanent supervisory vacancies to become available were on August 1, 1973. One of those jobs was given to Mr. Kirby Barnes, another black employee, and the second supervisory position was given to Mr. D. J. Bolton, a white employee. Mr. Bolton had worked in Department 1300 since May 28, 1957, and the supervisory job to which he was promoted was on the "B side", a part of the production process in which Mr. Bean had never worked.

There is simply insufficient evidence to conclude that any of the white employees promoted to supervisory positions in Department 1300 were less qualified than Plaintiff Bean.[2] Rather, it appears that Mr. Bean was not as qualified for the vacancies as any of the persons selected. This finding is based on Mr. Bean's apparent difficulty in relating to or communicating with some of his fellow employees. Although Goodyear has never questioned the technical quality of Mr. Bean's work while on

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2. *See Olson v. Philco-Ford*, 531 F.2d 474 (10th Cir. 1976) (in disparate treatment case, a woman's showing that she was qualified for promotion to a single opening, but a qualified male was selected instead, is insufficient to constitute even a prima facie case of sex discrimination).

temporary supervision, the Company was justified in concluding that he would not have been an effective supervisor.

6. Mr. Coye Wilcox, a white employee, has also worked in a temporary supervisory capacity, but has never been selected for a permanent vacancy. Mr. Wilcox's performance as a temporary supervisor, like that of Mr. Bean, revealed that he would not be as good a candidate for a permanent supervisory position as someone else.

As shown by Defendant's Exhibit 7, Mr. Wilcox has worked in Department 1300 since 1951 and has been made temporary supervisor on 6 occasions, the most recent of which was from March 13, 1978 to August 28, 1978. Mr. Wilcox, however, was not promoted to the permanent supervisory job which subsequently became available. Rather, on October 28, 1978, Mr. F. G. Gault was promoted to the permanent supervisor job aspired to by Mr. Wilcox. Mr. Wilcox, like Mr. Bean, simply had not been performing well on temporary supervision, and someone else got the permanent job when it came open. This is the same disappointment which befell Mr. Bean.. This disappointment, however, was the result of each employee's demonstration of relative inability to perform the supervisory tasks as well as others who were ultimately chosen for the permanent jobs.

7. The decision to promote other persons, rather than Mr. Bean, to permanent supervisory positions in Department 1300 was not based on Mr. Bean's race; rather, it was based on Defendant's reasonable belief that others were better qualified to fill the vacancies.

8. The Court finds that Mr. Bean lacked (and that Defendant was sincere in believing that he lacked) certain

skills and attributes essential to the performance of a supervisory function. His working relationships with certain employees, as well as the attitude he often manifested toward his peers and his supervisors, made it highly improbable that he would be an effective supervisor. Other courts have recognized that these factors are important considerations in selecting persons for supervisory positions.

Obviously, an employee's "ability to work amicably with fellow employees" is a valid criterion in selecting someone for a supervisory job. *Nance v. Union Carbide Corp.*, 540 F.2d 718, 727 (4th Cir. 1976). This principle was recently reaffirmed by the Fifth Circuit in *Burdine v. Texas Department of Community Affairs*, ____F.2d____, 21 FEP Cases 975 (5th Cir. 1979) where the Court found that the promotion of a male (rather than the female plaintiff) was justified on the basis of the male's "ability to work well with others" and the fact that the employer "felt that she [the female plaintiff] had had some difficulty with her co-workers." *Id.* at p. 978. Numerous other courts have sustained this same finding. *E.g.,Avon v. Sampson*, 547 F.2d 446 (9th Cir. 1976); *Burns v. Thiokol Chemical Corp.*, 6 FEP Cases 261, 268 (N.D. Ala. 1971), rev'd on other grounds, 483 F.2d 300 (5th Cir. 1973). See especially, *Guy v. Peaches Records & Tapes, Inc.*, 22 EPD ¶ 30,671 (E.D. Mo. 1979).

9. The persons with primary responsibility for viewing and evaluating Mr. Bean's performance as a temporary supervisor, Messrs. Love and Morris, testified in detail concerning why they thought Mr. Bean would not make a good supervisor. Both witnesses testified in detail concerning the factors underlying their views. The Court

finds that they were correct in concluding that Mr. Bean was not qualified for a permanent supervisory position, or at the very least, that he was not as well qualified as others who were subsequently selected for permanent supervisory jobs. *Pond v. Braniff Airways, Inc.*, 500 F.2d 161, 165-66 (5th Cir. 1974). There is no evidence of any other temporary supervisor, white or black, who experienced as much difficulty in working with subordinates as did Mr. Bean.

C. *Warehouse and Shipping Department and Plaintiff Bay*

1. The Warehouse and Shipping Department (1400) handles the finished product at the Plant. This Department's hourly employees are called "Warehousemen and Shippers." Their job is generally to use fork lifts to take the finished product from the production lines to the warehouse, weigh and ticket it, and place it in storage prior to shipping. The drivers also load both trucks and rail cars with the finished product. There is some complexity to the weighing, storage, selection and shipping of the product. At times the warehouse becomes full and the aisles are also used for storage. In such an event the expertise of the drivers and supervisors in Department 1400 is of great importance to the smooth flow of the business.

2. A Department 1400 supervisor does not drive a fork lift but directs those who do such work. The supervisor must tag, select and arrange product for proper storage and shipment. As stated above, when the warehouse becomes full this job can be complex and pressure-filled. The 1400 supervisor directs the hourly warehousemen and shippers in this movement, storage and shipping of the finished product. The supervisors in Department

1400 all have had considerable experience in the day to day operation of the warehouse. The supervisors are selected from among the ranks of the hourly 1400 employees or 1400 salaried clerks.

3. From 1968 to approximately 1972, Department 1400 also included the "box factory".

4. The box factory was an area in the warehouse where "T" boxes and "Continental" boxes were repaired and assembled by laborers and carpenters. These boxes (really crates) were then used to ship finished rubber products. The carpenters were members of the Maintenance Department (1100), the laborers were from the Labor Department (1911); fork lift drivers from the Stores and Receiving Department (1220) set up the materials to be used or boxes to be repaired for the laborers and carpenters.

5. From its inception in 1965 the box factory was an anomaly, first a part of the Labor Department (1911), and then, in 1968, of Department 1400. At the time Jack Unkel became foreman of Department 1400 in August, 1968, the box factory was placed under the administration and supervision of 1400. William Chaffin, a labor supervisor in charge of the box factory came with the box factory, and remained as supervisor over the box factory in Department 1400 for 45 days, until November 8, 1968.

6. After Chaffin assumed other duties away from the box factory, Unkel appointed "Tex" Ritter, a 1400 supervisor as supervisor over the box factory. Ritter was followed by Wayne Dodson and Noel Burchman, both of whom were Department 1400 employees.

7. After the box factory was placed under Department 1400 administration in 1968, all supervisors over it came from Department 1400.

8. The Court credits Unkel's testimony that in selecting a supervisor for the box factory, Unkel primarily wanted someone who could rotate throughout the warehouse so as to assume supervisory duties in the warehouse when other 1400 supervisors were on vacation or ill. Given such a criterion, the pool of candidates for the box factory supervisory position was limited to employees in Department 1400.

9. Plaintiff Otis M. Bay was a Shipping Clerk. His duties consisted of driving a fork lift, and he has been a member of Department 1220 from his employment in September, 1965 to the present.

10. Department 1220 clerks (fork lift drivers) are assigned to other departments to perform specified tasks. One driver is assigned to "D-6". Another is assigned as a driver for the Maintenance Department. Yet another is a "Batch-Up" man. Three such 1220 clerks were assigned to the box factory as fork lift drivers. While performing these various tasks the 1220 drivers continue to accumulate 1220 departmental seniority. However, they are not eligible for promotion in these other departments, but only in Department 1220. Each March a preference list is circulated among 1220 Shipping Clerks whereby the clerks choose their assignments for the next year on the basis of seniority. Plaintiff Bay consistently chose to work in the box factory until it closed.

11. In 1967-1968 Plaintiff Bay acted as a kind of leadman on the second shift in the box factory under William Chaffin. Bay notified the laborers and carpenters of the

type of box to be assembled or repaired on the second shift, brought them the materials, and made a record of the boxes completed. Mr. Bay was the only fork lift driver on that shift. Mr. Bay now claims that he acted as a supervisor, and that his failure to seek the extra money paid to a temporary supervisor was "an oversight". Mr. Bay was still paid the usual hourly rate for Shipping Clerks during this period. Permanent supervisors are salaried. Plaintiff continued to drive his fork lift throughout the period he claims he acted as supervisor.[3]

12. On each shift the 1220 fork truck drivers set up boxes for the laborers and carpenters, and kept track of the number of boxes repaired and assembled.

13. Unlike temporary or permanent supervisors, Mr. Bay did not discipline employees; did not grant time off; did not keep a record of attendance or sign time cards; did not keep a record of materials costs, amount of materials used, cost of labor, nor did he fill out materials requisition orders.

14. Mr. Bay, although he may have given minimal direction to the laborers and carpenters, was not a supervisor. He did not perform any of the traditional duties of a supervisor, nor was he recognized as such by Goodyear. At most, he served in a lead capacity on the second shift.

15. The only two promotions to supervisor over the box factory about which Mr. Bay complains are the promotions awarded to Wayne Dodson and Noel Burcham.

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3. It would be considered a violation of the collective bargaining agreement for a supervisor to drive a fork lift.

16. One of the requirements for supervisor over the box factory was the ability also to supervise the warehouse (1400) operation. Plaintiff Bay acknowledged that he had never worked in the warehouse. Mr. Bay further acknowledged that he was unfamiliar with the day-to-day operation of the warehouse. Messrs. Dodson and Burcham, on the other hand, had worked in the warehouse for 22 and 20 years, respectively prior to their supervisory promotions.

17. Wayne Dodson was promoted to acting warehouse supervisor on February 10, 1969. He was promoted to permanent supervisor in Warehouse and Shipping on February 16, 1970. Noel Burcham became a temporary Warehouse and Shipping supervisor on October 16, 1970. He became a permanent Warehouse and Shipping supervisor on March 16, 1971.

18. Both Dodson and Burcham did rotate into the remainder of the warehouse for supervision as planned by Unkel, the Department 1400 foreman. Mr. Bay claims that Burcham had supervisory duties over the box factory in April, 1970. This is an apparent mistake on Bay's part. Defendant's Exhibit No. 14, a memorandum reciting duties given to Burcham in April, 1970, clearly reveals that if Burcham acted in a supervisory capacity over the box factory during the same period as Mr. Bay claims, that he also held significant duties relating to tare weights, scales, package types and change overs—all normal warehouse duties in 1400.

19. Unkel made the decisions to promote Dodson and Burcham. However, Unkel had no responsibility for or authority over Department 1220 when these two promotions were made. Plaintiff Bay was then a member of

Department 1220. Supervisory promotions at the Plant are made on a departmental basis from among the given department's non-supervisory employees.

20. The box factory supervisory openings occurred in Department 1400. Department 1220 employees were not eligible for such positions. Accordingly, Plaintiff Bay was not subjected to race discrimination when he did not receive the promotions awarded to Dodson and Burcham.

21. Bay turned down Unkel's suggestion that Bay transfer into Department 1400.

22. Plaintiff Bay never transferred to Department 1400. Accordingly, Plaintiff Bay was really not in the running for any promotion to supervisor in Department 1400 from November 8, 1969 to the date of trial.

23. James Stell, a black supervisor in 1400, also claimed that he was "equally" qualified to Dodson and Burcham. However, the credible evidence demonstrates that both Dodson and Burcham, based on their much greater experience alone, were better qualified than Stell. Also, both Dodson and Burcham had supervisory experience prior to their emploment at Goodyear. Stell entered Department 1400 in 1965. Dodson entered it in 1948, Burcham in 1951. The Court credits Unkel's testimony that Burcham and Dodson were, at the time the supervisory positions became available, more qualified than Stell, and that Stell's race was not a factor in his not being promoted to those vacancies.

24. Credible evidence demonstrates that James Stell was not a victim of race discrimination when he was not awarded the Department 1400 supervisory promotions given to C. E. Watson on March 16, 1971 and

Hubert Page on September 1, 1975. The preponderance of the evidence is that at the time of these promotions the more experienced Watson and Page were better qualified. Indeed, Mr. Stell never claimed to be more qualified than either Watson or Page.

25. Since 1968 Unkel has directed a relatively small department in which he knew, and knows, each employee, and has frequent opportunities to observe them in their work. There is no credible evidence that race was a factor in his supervisory selections. The preponderance of credible evidence demonstrates that promotions to supervisory positions in Department 1400 were not made in a discriminatory manner during the relevant period of November 8, 1969 to the date of trial. Rather, as explained by Unkel, he "went with the best he thought he had" when the vacancy occurred.

26. During this period Black employees in Department 1400 received two of the six (33%) supervisory promotions. The average years of departmental experience prior to promotion for whites was 17.5. The average years of departmental experience prior to promotion for blacks was 9.4.

D. *Receiving and Stores Department and Plaintiff Bay*

1. The Receiving and Stores Department (1220) is made up of storeroom clerks. These clerks are assigned various jobs throughout the plant. Two clerks batch-up material in certain areas of the plant, such as D-6. Two work in the storeroom dispensing material. One drives a fork lift for maintenance moving heavy equipment. During the existence of the box factory segment of Department 1400, three 1220 clerks were assigned to drive

fork lifts there. *All of these assignments were and are subject to choice by seniority once a year.*

2. The box factory was never a part of Department 1220. Rather, from 1968 until it closed it was a part of Department 1400. Previously, it had been a part of Department 1911.

3. Department 1220 is comprised of two sections. The Storeroom holds spare parts and equipment. Six to seven thousand stock items are maintained in this area. The "D-2 Area" is the receiving point for raw materials. In the D-2 office raw materials are ordered and their delivery scheduled.

4. Between November 8, 1969 and the date of trial only two supervisory promotions have occurred in Department 1220.

5. In 1972 Jack Unkel first received responsibility for Department 1220. Prior to this time, Unkel had authority only over Department 1400. From 1972 forward, Unkel has had dual responsibility for all promotions in both Departments 1400 and 1220.

6. On November 6, 1973, H. E. Frank was promoted to the position of supervisor in Department 1220 in the D-2 area.

7. The D-2 supervisory position involves the ordering and scheduling of the raw materials and chemicals used in production. Because of very limited storage facilities the delivery of chemical shipments must be timed with great accuracy in order to avoid shortages. The D-2 supervisor is responsible for maintaining raw materials inventory levels for polymer production. He receives the production schedule and breaks it down into chemical

components. The chemicals are then ordered and their delivery synchronized with productioin requirements and storage capacities.

8. Herman Frank has worked in Department 1220 since 1946. There was undisputed testimony that Frank had been in charge of the D-2 ledger sheets and had been involved with the ordering and scheduling of the raw materials for a number of years prior to 1973.

9. While Mr. Bay drove a fork lift in the box factory, Wendell Mayes served for 4 years as the clerk helping Joe Heinbeck, the 1220 supervisor in the "D-2" area at that time.

10. After the close of the box factory in 1972, Plaintiff Bay assumed duties under Heinbeck. Part of his duties included fork lift driving and confirmation of deliveries. He was not involved, however, in the actual ordering and scheduling of chemical shipments.

11. At the time of the retirement of Heinbeck, Mr. Franks was the most qualified replacement as D-2 supervisor in Department 1220.

12. If Franks had not been chosen, certainly Mayes, with four years experience working in the D-2 office would have been the next logical choice.

13. Frank was chosen for his experience in scheduling, accuracy, and his extensive background in Department 1220 positions, including Storeroom Clerk, Stock-record Clerk, and Materials Inventory Clerk from 1956 to 1973.

14. Race was not a factor in the promotion of Franks. Plaintiff Bay was not more qualified than (or even as qualified as) Franks for the job to which Franks was promoted.

15. The second supervisory opening in 1220 was filled on June 1, 1974 by Wendell Mayes. This position was that of supervisor over the Storeroom area.

16. The Storeroom supervisor is charged with the responsibility of maintaining an inventory of between 6,000-7,000 stock items including spare parts. There is a filing and posting system for withdrawals and orders. Bids are taken on materials and equipment to be ordered. Each year an inventory of items is taken which consumes six months' time. The supervisor collates the inventory cards and balances out the end of the year for tax purposes. The duties of the Storeroom supervisor include a number of accounting-type duties.

17. Mayes was hired in August, 1965 with his supervisory potential in mind. In 1968, 1969 and 1970 he was a temporary supervisor in 1220 for vacation relief purposes. Prior to coming to Goodyear, Mayes had been a store manager and an accountant. Mayes is a 1949 graduate of Trinity University, with a degree in Business Management. His major was accounting.

18. Plaintiff Bay acknowledged that he was not "more qualified" than Mayes, but believed he was perhaps "equally qualified" for the promotion.

19. Plaintiff Bay graduated from Texas Southern University in 1972 with a degree in Education.

20. From 1972 until his promotion on June 1, 1974, Mayes worked in the 1220 Storeroom as a salaried clerk. Plaintiff Bay had never worked in the Storeroom prior to Mayes' promotion to supervisor.

21. Mayes was more qualified than Mr. Bay for the Storeroom supervisory position. There is no evidence that race was a factor in the selection of Mayes over Bay.

22. After Mayes' promotion, Plaintiff Bay was promoted to the position of Chief Clerk. The Chief Clerk position is salaried, and carries some relief supervisory responsibilities. The Chief Clerk position is traditionally the next step to supervision in Department 1220.

23. The preponderance of the evidence demonstrates that Plaintiff Bay was not a victim of race discrimination in relation to the promotions in Department 1220.

24. Since 1972 Unkel has also directed Department 1220, which is much smaller in size than Department 1400. He has known, and knows, each employee and has had frequent opportunities to observe them in their work. There is no credible evidence that race was a factor in his two supervisory promotions.

E. *Plaintiffs' Other Witnesses*

1. Plaintiff called several witnesses who claimed they were unlawfully denied supervisory vacancies. The testimony of these persons, however, was primarily conclusory, without any real evidence that any of them were passed over for a supervisory vacancy in favor of a less qualified white employee.

2. Mr. Moses Bradford, a Department 1300 employee, has been a supervisor there since January 1, 1977. Mr. Bradford began work in Department 1300 on August 16, 1965.

Mr. Bradford was first promoted to a temporary supervisory job in 1300 on March 20, 1973 to replace Mr. Bean who was then sent back to the hourly workforce on March 26, 1973. He served as temporary supervisor until he was returned to the hourly workforce on Sep-

tember 15, 1973. No one was promoted to permanent supervisor in Department 1300 at or about the time Mr. Bradford was returned to the hourly workforce. The last two permanent supervisory vacancies prior to September 15, 1973 occurred on August 1, 1973, one going to a black employee, Kirby Barnes, the other going to a white employee, D. J. Bolton, who had worked on the "B Side" where Mr. Bradford acknowledged he had never worked.

The next employee promoted to permanent supervisor in 1300 was Mr. R. T. McInnis, a white employee, who was promoted October 1, 1974. Mr. McInnis had been employed in 1300 since October 25, 1958. He had worked on both the "A and B" sides of the Department and he had served in the position of production balance operator for approximately 6 years prior to his promotion.

At the same time Mr. McInnis was given a permanent supervisory job, October 1, 1974, Mr. Bradford was chosen for the Squadron Training Program. Persons selected for participation in the Squadron Training Program are placed on salaried status. The Program is designed to be taken by candidates for production management or staff positions within the organization. The Program began on October 1, 1974 when two men began training. It was necessary, because of economic conditions, to suspend the Program in February 1975. The Program began again in November 1975. The employees who participated in the Program were Moses Bradford, John Russell, a white employee, and Sam Hill, also a white employee. On January 1, 1977, Mr. Bradford was promoted to the next supervisory vacancy to occur after his completion of the Squadron Training Program.

The only permanent supervisory promotion about which Mr. Bradford testified is the one given to Mr. R. T. McInnis. The evidence, however, fails to show that the selection of Mr. McInnis over Mr. Bradford was because of Mr. Bradford's race. Rather, it appears that because of Mr. McInnis' longer experience plus his exposure to *both* sides of the production operation, the Company chose Mr. McInnis for the supervisory vacancy which ultimately developed on the B Side,[3] an aspect of production with which Mr. Bradford candidly admits he has absolutely no familiarity, but in which he could have gained experience by use of his contractual seniority, had he chosen to do so.

Mr. Bradford also complained about the selection of Mr. Sam Hill to serve as a temporary supervisor on June 2, 1975. However, the evidence fails to show that the selection of Mr. Hill for this temporary job, rather than Mr. Bradford, was because of Mr. Bradford's race. Four months after assuming the temporary job, Mr. Hill joined Mr. Bradford in the resumption of the Squadron Training Program. As stated, the very next permanent supervisory job which then became available went to Mr. Bradford. Mr. Hill resigned without ever having been promoted to permanent supervisor.

Finally, Mr. Bradford testified about promotions given to two employees in the Maintenance and Engineering Department, Department 1100. However, there is no evidence that Mr. Bradford had even minimal qualifica-

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3. When the promotion was given to Mr. McInnis, Mr. Nichols, the production superintendent, explained McInnis' superior qualifications to Mr. Bradford by telling him that McInnis' experience on both sides would enable him to serve as a "swing man", i.e., supervise on either side if needed.

tions for either of these promotions. Mr. Bradford never worked in Department 1100, and did not claim to have any skills or experience as a craftsman. Moreover, Mr. Clary was promoted to supervisor in 1100 on February 1, 1977 and Mr. Broussard was promoted on January 16, 1978. Both promotions occurred one month and one year, respectively, *after* Mr. Bradford had already been promoted to permanent supervisor in Department 1300.

3. Plaintiff Charles Bean's brother, John Bean, testified that he has been employed in Department 1911 since coming to work with Goodyear. He has for a number of years been employed in the classification of Heavy Equipment Operator. Mr. John Bean could point to no permanent supervisory vacancy in the Labor Department denied him, because throughout the relevant time frame and beyond, the Labor Department (1911) has had only one supervisor, Dean Coleman, who has been the supervisor in that department since 1953. Consequently, there have been no vacancies for permanent supervisory jobs there.

4. Mr. John Bean's primary complaint seems to stem from the decision in late 1975 or early 1976 to allow Mr. Elmer Ray Johnson, a white employee, to serve as temporary supervisor in 1911 in the absence of Mr. Dean Coleman. Mr. Bean had previsouly been stepped up as temporary supervisor in Mr. Coleman's absence. Mr. Bean candidly acknowledged the Company's explanation that in a reorganization which occurred in late 1975 or early 1976, Mr. Coleman was given additional responsibility not only over the 1911 laborers, but, also over the carpenters and painters. Mr. Elmer Ray Johnson has been a carpenter leadman for a number of years.

Mr. John Bean has never worked as a carpenter or a painter.

There is no evidence that the decision to give Mr. Elmer Ray Johnson a chance on temporary supervision beginning in 1976, rather than continuing with Mr. Bean in that capacity, was because of Mr. Bean's race. Indeed, the evidence is precisely to the contrary. Mr. Bean was stepped up as temporary supervisor when Mr. Coleman had supervisory responsibilities only over laborers. Once Mr. Coleman assumed additional authority over carpenters and painters, the Company logically decided to give an employee in one of the other job categories a chance to demonstrate his supervisory potential on a temporary basis. No final decision has been made as yet as to which, if either, employee will ultimately be promoted to replace Mr. Coleman when he retires. There simply have been no promotions to permanent supervisory jobs in the Labor Department since 1953. The decision to give a carpenter leadman a chance to demonstrate his supervisory potential once Mr. Coleman assumed authority over carpenters is only logical. The weight of credible evidence is wholly inconsistent with any inference that Mr. Bean's race had anything to do with that decision.

5. Mr. Louis J. Watson testified that he has been employed in Department 1300 since 1967. While employed with Goodyear he has earned a degree in pharmacy, and in the summer of 1978 he spoke with a representative of the Company's personnel department, Lon Bosley, about promotional opportunities. Mr. Bosley told Mr. Watson that there were no vacancies at that time for Process Operation Engineers, for there were two experienced engineers transferring in from a Goodyear

plant which had closed in Akron, Ohio, to assume their same jobs at the Houston Plant. Mr. Bosley also explained to Mr. Watson that to become a Process Operation Engineer it is best first to obtain some experience in the Company's Laboratory Department (1020), because most of the persons selected as Process Operations Engineers are either graduate chemical engineers or persons who have gained experience with the Company's chemical processes by working in the Laboratory.

In December 1978, openings occurred for two instrument lab chemists, the top paying, hourly rated job in the Laboratory. When the Company was unable to obtain sufficient bidders for these jobs in the laboratory group, it posted these vacancies for bid for all employees in all seniority groups covered by the I.U.O.E. contract.[4] The vacancies remained posted from December 28, 1978 to January 3, 1979, but despite his apparent qualifications, Mr. Watson failed to bid on either job. As a consequence, Goodyear was forced to hire someone from outside its own workforce to fill one of the instrument lab chemist jobs.

In Mr. Watson's case, there is simply no evidence that he was overlooked for any supervisory vacancy for which he was qualified. Rather, he has chosen to remain in Department 1300 and "take his chances" there for future supervisory vacancies. Interestingly, the first permanent supervisory position awarded to anyone in Department 1300 after Mr. Watson made known his degree in pharmacy was given to Mr. F. E. Conley, a Black employee who had been employed in Department 1300 three years longer than Mr. Watson.

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4. The Company decided to post these opening even though it had no contractual obligation to do so.

6. Finally, Plaintiffs called Mr. R. L. Johnson, the plaintiff in the case styled *R. L. Johnson v. The Goodyear Tire & Rubber Company,* a case which was filed in 1969 and decided by Judge Bue of this District in 1972. Until 1973, Mr. Johnson worked in the Labor Department where he had been employed since 1944. The only supervisory job to which Mr. Johnson even alluded in his testimony is a reference that he "should have been" promoted to supervisor in the Labor Department in 1968 or 1969. However, not only are these dates outside the time frame relevant to this case, there is no evidence that any supervisory jobs even came open in the Labor Department then. In fact, the evidence is directly to the contrary. There have been no vacancies for permanent supervisory jobs in the Labor Department, because as Mr. Johnson conceded, Mr. Coleman has been the only supervisor there since the early 1950's and he has never retired or been replaced by anyone on a permanent basis.

F. *Statistical Evidence*

1. Both parties presented evidence on the issue of whether Goodyear's supervisory promotion policies at this Plant operated adversely upon members of the class.

2. The focus here necessarily must be on what happened during the liability period from November 8, 1969 to date. How many supervisory promotional opportunities became available? Who got them? In other words, did Goodyear's supervisory promotional policies prevent Black employees from receiving their proportionate share of promotions?

3. According to Plaintiffs' Exhibit 24, from 1969 through 1979, Blacks made up from 11.7% (1969)

to 19.5% (1979) of Plant's total workforce. Defendant's Exhibit 1 reveals, without any contradiction, that during this same period 37 employees were promoted to permanent supervisory jobs throughout the Plant. Of these 37 promotions, Blacks received 8, or 21.6%.

Moreover, as shown by Defendant's Exhibit 1, during this same time period two other black employees in Department 1300 were offered opportunities for supervisory positions, but expressed disinterest in being supervisors at that time. In addition, a third black employee, in Department 1100, asked to return to the hourly workforce from a temporary supervisory position despite urgings from Goodyear that he remain on supervision.

4. Of the 37 promotions to supervisor which occurred during the relevant time frame, most occurred in Department 1300 where 14 promotions were given. Again, as revealed by Defendant's Exhibit 1, Black employees received 5 of these 14 promotions, or 36%. At no time, however, during the liability period have Blacks comprised as much as 36% of the non-supervisory workforce in Department 1300. To the contrary, from 1970 through 1979 Blacks have comprised from 11.78% to 23.27% of the non-supervisory workforce in that Department.

A review of the departmental entry dates for those promoted in Department 1300 reveals an important statistic. Not one white employee who has entered Department 1300 since November 5, 1961 has been promoted to supervisor. However, five black employees, all with entry dates later than November 5, 1961 have been promoted to supervisor. See Defendant's Exhibit No. 1, page 1.

5. During this same period, there have been only 6 supervisory promotions in Department 3300. Five of these promotions went to white employees, with one promotion going to a Mexican-American. There are, however, no black employees working in Department 3300, despite the fact that non-supervisory job openings there are filled strictly by seniority under the bidding procedures set out in the Labor Agreement with Operating Engineers Local 347. Moreover, the Court credits the uncontradicted testimony of the personnel director that most employees bidding into Department 3300 are relatively low seniority employees and that numerous black employees have ample seniority to bid into that Department, but have chosen not to. Only one black employee has ever sought to bid into Department 3300. He was disqualified from performing the work on the basis of his qualifications. The decision to disqualify the black employee was sustained by a neutral arbitrator under the terms of the Contract. Similarly, a white employee was also disqualified from entry into Department 3300, and the decision to disqualify him from the work was also sustained in a proceeding before a neutral arbitrator.

6. In Department 1100 there have been 5 supervisory promotions during the relevant time period. Four of these promotions went to white employees, and one went to a Mexican-American. It is in Department 1100 that a black employee in 1978 asked to return to the hourly workforce from a supervisory position despite urgings from Goodyear to remain on supervision. Employees in Department 1100 are craftsmen such as electricians, mechanics and instrument repairmen. There have been relatively few black craftsmen over the past 10 years. There was no testimony or other evidence whatsoever at

trial of any qualified Black employee in Department 1100 being overlooked for a supervisory promotion in favor of anyone. Rather, all the Plaintiffs' evidence at trial centered on supervisory promotions which occurred in Departments 1300, 1220 and 1400.

7. In Department 1220 where Mr. Bay has worked throughout his employment with Goodyear, there have been only 2 supervisory promotions since November 8, 1969. Both promotions went to white employees whose superior qualifications, relative to Mr. Bay's qualifications, are discussed in detail *supra.*

8. In Department 1400 there have been 6 promotions to supervisor since November 8, 1969. Four of these promotions went to white employees, and two, or 33%, went to Black employees.

Not one white employee entering Department 1400 after November 6, 1961 has received a promotion. Two blacks, with entry dates in 1965 and 1967, have received supervisory promotions. See Defendant's Exhibit No. 1, page 5.

9. In Department 1020, there have been 4 supervisory promotions since November 8, 1969. Three of these promotions went to whites, with one promotion, or 25%, going to a Black. During this same time period, Blacks have comprised from between 10% and approximately 25% of the non-supervisory workforce in Department 1020.

10. As shown by Defendant's Exhibit 15, if one examines the supervisory promotions based simply on what one might statistically expect to occur based on the proportionate make up of the non-supervisory workforce

within these 6 departments, in the aggregate one would expect Blacks to have received nearly 6 promotions based on their representation in the pools from which supervisors are drawn. As stated, Blacks actually received 8 promotions during this period.

11. Most of Plaintiffs' exhibits depict, in various forms, the utilization of black and white persons in various job categories within Defendant's workforce during the year 1968 through 1979. This evidence, standing alone, does not permit the drawing of any inference relating to racial discrimination in the promotion of supervisors during the relevant time frame. This is because it is more appropriate to focus not on the state of Defendant's workforce at a given moment in time, but on Defendant's behavior during the period from November 8, 1969 to date. *Hazelwood School District v. United States, supra,* at 309; *United Airlines v. Evans,* 341 U.S. 533 (1977); *EEOC v. Local 14, Operating Engineers,* 13 EPD ¶ 11,591 (2nd Cir. 1977).

12. Even if it is assumed that Plaintiffs somehow have stated a *prima facie* case with respect to supervisory promotional discrimination, Defendant has come forward with considerable evidence which dispels any inference of discrimination in this area. Defendant's evidence shows, for example, that the actual promotion rate of black employees to supervisory jobs exceeds their proportionate representation in the pools from which supervisors are selected.

Defendant's statistical exhibits and expert testimony provide an anlysis which, unlike Plaintiffs', considers the actions taken by Goodyear with respect to promotable pools of employees in the various departments. Taking

into account the proportionate number of black non-supervisory employees in the various departments, Defendant's evidence demonstrates the number of black supervisory promotions which would be expected considering their representation in the non-supervisory jobs in the various departments.

The result of the analysis is that since November 8, 1979, black employees received a greater proportion of supervisory promotions than would be expected based on their representation in the pools from which supervisors are selected and within the workforce as a whole.

13. In view of the statistics, Goodyear's supervisory promotional policies have not impacted adversely on Blacks at the Plant since November 8, 1969. Rather, the evidence reveals that Blacks have, indeed, received more than their proportionate share of supervisory vacancies. Plaintiffs' own exhibits actually confirm this. Plaintiffs' Exhibit 16 shows Blacks receiving 36% of the 14 supervisory promotions shown—or more than their percentage representation in the workforce. Plaintiffs' Exhibit 19 shows Blacks receiving 44% of the temporary supervisory promotions awarded since March 1973. Again, this represents a far greater proportion of the temporary supervisory positions being awarded to Blacks than their numerical representation in Defendant's workforce.

14. In view of the foregoing, the Court finds that Plaintiffs have not proven that black employees, as a class, have been denied available supervisory positions at the Plant during the time period for which liability in this case may attach. Rather, the statistical evidence favors Blacks in that they have received more supervisory promotions during this period than would be expected based

solely on their representation in the relevant labor pools, regardless of whether one uses as the relevant pool the department in which the promotions occurred or the Company's entire non-supervisory workforce.

It is evident from this that the promotion rate for black persons is at least as high as that for whites. In such curcumstances, the Court finds that Defendant has not discriminated against black persons with respect to supervisory promotions during the years from November 8, 1979 to date. The record is simply devoid of any credible evidence supporting a finding to the contrary.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over Defendant The Goodyear Tire & Rubber Company under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* and 42 U.S.C. § 1981.

A. *Plaintiffs' Title VII individual claims*

2. The Supreme Court has now settled the issues concerning the order of proof in Title VII cases. First, a plaintiff carries the burden of proving a prima facie case of unlawful discrimination. In order to do so, he must

> . . . show actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under the Act.

Furnco Construction Corp. v. Waters, 438 U.S. 567, 576 (1978). A plaintiff has established a prima facie case only when he has shown acts which "if otherwise unex-

plained, are more likely than not based on the consideration of impermissible factors." *Id.* at 577. In assessing a plaintiff's attempt to establish a prima facie case, a court must.

> . . . demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought.

Teamsters v. U.S., 431 U.S. 324, 358 n.44 (1977). Similarly, in order even to establish a prima facie case, Plaintiffs Bay and Bean would have to demonstrate that their failure to receive promotions resulted neither from their absolute or relative lack of qualifications nor from the absence of a vacancy in the job sought.

As an additional matter, this Court notes that in a "disparate treatment" case (such as Plaintiffs'), "[p]roof of discriminatory motive is critical." *Id.* at 335 n.15.

3. Second, if a plaintiff succeeds in establishing a prima facie case, the burden shifts to the employer. In order to dispel the adverse inference from a prima facie showing, however, "the employer need only 'articulate some legitimate, non-discriminatory reason for the employee's rejection.'" *Furnco Construction Corp. v. Waters, supra. See also Board of Trustees v. Sweeney*, 439 U.S. 24, 25 (1978) ("Merely 'articulating some legitimate, non-discriminatory reason' . . . will suffice to meet the employee's prima facie case of discrimination."); *Hamilton v. General Motors Corp.*, 606 F.2d 576 (5th Cir. 1979) (If the plaintiff establishes a prima facie case,

the responsibility shifts to the defendant to "articulate legitimate, non-discriminatory reasons for its actions.") *Sweeney v. Broad of Trustees,* 604 F.2d 106, 108 (1st Cir. 1979), on remand from Supreme Court, 439 U.S. 24 (1978) ("[T]he defendant's burden is merely a burden of production, and the burden of persuasion remains at all times with the plaintiff.") As the Supreme Court noted in *Sweeney, supra.*

> [T]he employer's burden is satisfied if he simply 'explains what he has done' or 'produces evidence of legitimate non-discriminatory reasons.'

439 U.S. at 25 n.2.

The Fifth Circuit has stated that if the plaintiff establishes a prima facie case, the Defendant may refute that case by adducing nondiscriminatory reasons for its actions. A "preponderance of the evidence" standard is used. *Burdine v. Texas Dept. of Community Affairs,* ____F.2d____, 21 FEP 975 (5th Cir. 1979). See also, *Turner v. Texas Instruments,* 555 F.2d 1251, 1255 (5th Cir. 1977). But *c.f. Tortorici v. Harris,* ____F.2d____, Jan. 21, 1980, slip opinion p. 2493 n.1 (5th Cir. 1980).

In assessing the employer's burden of production, this Court must note,

> It is clear in this Circuit that 'Title VII . . . [does] not protect against unfair business decisions—only against decisions motivated by unlawful animus.' *Turner v. Texas Instruments, Inc.,* 555 F.2d 1251 (5th Cir. 1977) . . . Even assuming that all of the candidates met the minimum qualifications for the position, defendant is not precluded from choosing the applicant whom it concluded was most qualified.

Haskell v. Rice University, 19 EPD ¶ 9137 at p. 6906, 19 FEP Cases 1209, 1210-11 (Bue, J.) (S.D. Tex. 1979) (bench ruling). *See also Haskell v. Rice University*, 21 EPD ¶ 30,307 (S.D. Tex. 1979). Thus, even if Goodyear's belief that Bay and Bean were less qualified for the positions sought was wrong, it is not guilty of unlawful discrimination if it acted on that good faith belief. Its honest belief would serve as a legitimate reason for its actions. *Corley v. Jackson Police Department*, 566 F.2d 994, 1003 n.14 (5th Cir. 1978); *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1256-57 (5th Cir. 1977); *Silberhorn v. General Iron Works Co.*, 584 F.2d 970, 972 (10th Cir. 1978) (approving the employer's "good faith, sincere belief" in non-discriminatory reasons). Goodyear's good faith belief that Plaintiffs were not as qualified as the individuals selected would constitute a legitimate, non-discriminatory reason for its decision. *Haskell v. Rice University, supra.*

4. Third, if a plaintiff establishes a prima facie case and the employer then articulates a legitimate, non-discriminatory reason for its action, the plaintiff must finally carry his burden of persuading the Court that the employer's stated reason is in fact a pretext. Only then have Plaintiffs proven a Title VII cause of action.

5. With respect to the Dodson and Burcham promotions, Plaintiff Bay did not make a prima facie case for *his* evidence showed that he was not the best qualified candidate and he did not demonstrate that his failure to receive the promotion was not based upon his lesser qualifications. *Teamsters v. U.S., supra*, 431 U.S. at 358 n.44. The supervisory positions in Department 1400, although they included the box factory where Plaintiff

worked, included many responsibilities in warehouse areas for which Plaintiff had neither experience nor training. Both Dodson and Burcham were expected to and did rotate through the warehouse and fulfill supervisory responsibilities there. Based on his overall background and experience as of the dates of the promotions, Plaintiff Bay was not qualified to handle the responsibilities of the positions.

In the same manner, Plaintiff Bay lacked qualification for all subsequent 1400 supervisory promotions. Plaintiff has never worked in Department 1400, and admitted he was unaware of the day-to-day operation of the department.

Even if Plaintiff Bay had been able to establish a prima facie case with respect to the Department 1400 promotions (including Dodson and Burcham), Goodyear met its burden of articulating and proving legitimate, non-discriminatory reasons for his not receiving the promotions. *Burdine v. Texas Dept. of Community Affairs, supra.*

6. With regard to the Department 1220 supervisory promotions of Franks and Mayes, Goodyear similarly met its burden of articulating and proving legitimate, non-discriminatory reasons for not selecting Plaintiff Bay. *Burdine, supra.* In each instance, the promoted individual had greater knowledge and experience in the particular job function being filled. Franks had maintained the D-2 ledger cards for a number of years and had performed materials work since 1956. Franks had years of departmental experience. Mayes had performed as the Storeroom Clerk since 1972, several years prior to his promotion to supervisor in that area. Also, Mayes' ac-

counting background is helpful to his accomplishment of the supervisory duties in the Storeroom. Plaintiff Bay did not even work in the Storeroom until after Mayes' supervisory promotion. Goodyear successfully rebutted any prima facie case which Plaintiff Bay may have made. *Furno Construction Corp. v. Waters, supra.* Both Franks and Mayes were better qualified than Plaintiff Bay at the time of the respective promotions.

7. Goodyear similarly met its burden of rebutting any prima facie showing of disparate treatment of Plaintiff Bean by its articulation of legitimate, non-discriminatory reasons for his not receiving a promotion to a permanent supervisory position. First, there was no permanent opening in March, 1973 when Plaintiff completed his six months as temporary supervisor. The next openings occurred on August 1, 1973 and they were filled by D. Bolton and K. Barnes—one white and one Black. Second, Plaintiff's erratic and sometimes hot-tempered performance while he was a temporary supervisor reasonably convinced Goodyear that Plaintiff Bean would not be a good permanent supervisor. Mr. Bean's apparent resentment of Mr. Barnes (as evidenced by his refusal to follow Barnes' orders without an appeal to the Personnel Manager) is further evidence that Mr. Bean would not make a good supervisor. Finally, in no instance since March, 1973 has Goodyear promoted an individual who was less qualified than Plaintiff Bean for a production supervisor position. On the contrary, in each instance, given Bean's performance while on temporary supervision, each of the persons promoted was better qualified than Plaintiff Bean. *Burdine v. Texas Dept. of Community Affairs,* ____F.2d ____, 21 FEP 975 (5th Cir. 1979). Therefore, Goodyear

successfully rebutted any prima facie case which Plaintiff Bean may have made. *Furnco, supra. See also, Green v. Armstrong Rubber Company,* ____F.2d____, slip opinion at 3519, February 29, 1980 (5th Cir. 1980) wherein the Court held that dissimilar conduct by the plaintiff lawfully resulted in dissimilar treatment by the employer. An employer's honest belief in non-discriminatory reasons serves as a legitimate basis for its actions. *Corley v. Jackson Police Department,* 566 F.2d 994, 1003 n.4 (5th Cir. 1978); *Turner v. Texas Instruments, Inc., supra,* 555 F.2d at 1256-57; *Silberhorn v. General Iron Works Co.,* 584 F.2d 970, 972 (10th Cir. 1978) (approving the employer's "good faith, sincere belief" in non-discriminatory reasons).

8. Plaintiffs did not prove that the reasons articulated by Goodyear for denying them the promotions were pretextual.

Plaintiffs complain that the selection process was unlawful because it was subjective. This proposition is incorrect. In the first place, Plaintiffs disregard the fact that objective factors — most obviously, relative levels of related departmental experience — were in fact considered, although not controlling. Plaintiffs are asking this Court to second-guess Goodyear as to *which* objective factors it should have given the greatest weight. This the Court cannot do. Instead, the Court endorses the recent statement of the Supreme Court that "Courts are generally less competent than employers to restructure business practices." *Furnco Construction Corp. v. Waters, supra.*

Second, Plaintiffs suggest an unrealistically narrow view of the law. Subjective procedures are not necessarily

violative of Title VII. "Title VII comes into play *only* when such practices result in discrimination." *Rogillio v. Diamond Shamrock Chemical Co.*, 446 F. Supp. 423 (S.D. Tex. 1977), quoting *Hester v. Southern Railway Co.*, 497 F.2d 1374, 1381 (5th Cir. 1974). Subjective reasons for the failure to promote Plaintiffs should be given consideration in rebutting their charges of discrimination, for courts recognize that employment decisions often cannot realistically be made on the basis of objective standards alone. *Id.* An employer's decision may properly be based on subjective factors. *Hamilton v. General Motors Corp.*, 606 F.2d 576, 580 (5th Cir. 1979); *Davis v. Board of School Commissioners*, 600 F.2d 470, 474-75 (5th Cir. 1979); *Hereford v. Huntsville Bd. of Ed.*, 574 F.2d 268, 270 (5th Cir. 1978); *Jenkins v. Caddo-Bossier Assn. for Retarded Children*, 570 F.2d 1227 (5th Cir. 1978); *Wisconsin National Organ. of Women v. State of Wisconsin*, 417 F. Supp. 978 (W.D. Wisc. 1976).

Most importantly, this Court must consider the result of Goodyear's promotional practices. Regardless of whether objective or subjective factors were utilized, did they result in an adverse treatment or impact upon Black employees? The answer here is "no". Accordingly, the mere presence of subjective procedures in the promotional process is not discriminatory. *Jenkins v. Caddo-Bossier Association, supra.*

B. *Plaintiffs' Title VII class claims*

9. With respect to the allegations of class-wide discrimination in the awarding of supervisory promotions, the Court finds that the evidence fails to raise a prima

facie case of systematic discrimination. Plaintiffs have failed to show that any of Defendant's policies has a disparate impact on black persons. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Court notes that a prima facie case based upon disparate impact must involve a showing of disparaties between an employment attribute (such as promotion, transfer, etc.) and the pool of persons qualified to obtain that attribute *United States v. Teamsters,* 431 U.S. 324 (1977); *Hazelwood School District v. United States,* 433 U.S. 299 (1977). Plaintiffs' own Exhibits Nos. 16 and 19, demonstrate the lack of class-wide discrimination. Plaintiffs' Exhibit No. 19 reveals that Blacks received, between March, 1973 (Bean's "demotion") and the date of trial, 44.9% of all promotions to temporary supervision. Plaintiffs' Exhibit No. 16 shows that between March, 1973 and the date of trial, 35.7% of all permanent supervisory promotions went to Black employees. The percentage of black employees has not exceeded 19.5% of the total workforce — which figure does not take into consideration the percentage of black employees with the requisite job experience for promotional consideration, a figure certain to be even lower, nor departmental figures.

10. Even if it were assumed that Plaintiff had stated a prima facie case with regard to the class allegations, the Court finds that Defendant rebutted Plaintiffs' class case on the basis of Defendant's statistical presentation. Defendant's Exhibit No. 1 reveals that on the whole blacks are promoted with less average job experience than whites. Defendant's Exhibit Nos. 15, 16, and 17 demonstrate the absence of systematic discrimination against Blacks. To the contrary, Blacks have, as a class,

been beneficiaries of Defendant's promotional policies and practices. For reasons more fully particularlized in the Court's Findings of Fact, the Court concludes that Defendant has not discriminated against black employees in relation to supervisory promotions.

11. All witnesses agreed that in order to be considered for a promotion to foreman one must be a supervisor. This is, the pool of candidates for foreman positions is the group of supervisors. The pool for promotion to general foreman is the foreman group. Obviously, if there is no class discrimination as to supervisory selection, the same follows for foreman-level promotions. There was no prima facie showing by Plaintiffs in this regard. From the date of the first black supervisory promotion, only two foreman positions have been filled. Plaintiffs failed to establish, or even claim, that any black supervisor should have received such promotions. In fact, none of Plaintiffs' witnesses, including several black supervisors, claimed they had been discriminatorily denied any foreman-level position. All relevant evidence, save that of a statistical nature, related to denial of supervisory promotions. Accordingly, the Court holds that Plaintiffs failed to make a prima facie case with regard to foreman-level promotions. Defendant established that the relevant labor pool for supervisory promotions is the experienced departmental hourly (and in two departments, salaried) employee force. Defendant also established that the relevant labor pool for foreman-level positions is the complement of supervisors. Under *Williams v. Tallahassee Motors, Inc.*, ____ F.2d ____, 21 FEP 626 (5th Cir. 1979), and *Hazelwood School District v. United States*, 433 U.S. 299, this Court's review

of promotional decisions should be keyed to the number of employees available for promotion. In *Hazelwood*, the Supreme Court clearly approved the use of a narrower labor pool defined by the qualifications for employment in a defendant's workforce.

12. Even if it is assumed that Plaintiffs had established a prima facie cause with regard to foreman-level promotions, Defendant successfully rebutted that showing. Defendant articulated a reasonable explanation for its actions, which the Court finds was not related to race. *Furnco Construction co. v. Waters*, 438 U.S. 567 (1978); *Board of Trustees of Keene State v. Sweeney*, 99 S.Ct. 295 (1978); *Hazelwood School District, supra; Williams v. Tallahassee Motors, Inc., supra.*

13. Defendant does not employ any practices or policies which impact adversely upon black persons with respect to supervisory practices. *Griggs v. Duke Power Co., supra; Furnco, supra; Davis v. Board of School Commissioners of Mobile County*, 600 F.2d 470, 474-75 (5th Cir. 1979); *Hester v. Southern Railway Co.*, 497 F.2d 1374, 1381-82 (5th Cir. 1974). Defendant's statistical presentation effectively rebutted any showing of adverse impact.

C. *Plaintiffs' §1981 action*

14. Plaintiffs' challenge to the promotions under §1981 is substantively congruent to their "disparate treatment" case under Title VII. *Scott v. University of Delaware*, 601 F.2d 76, 79-80 n.2 (3rd Cir. 1979), and cases cited therein. It is clear that §1981 affords no greater substantive protection than Title VII. *New*

York City Transit Authority v. Beazer, 440 U.S. 568, 583-84 n.24 (1979).

In order to show a violation of §1981, Plaintiffs must prove by a preponderance of the evidence that Goodyear acted toward them with an unlawful discriminatory purpose. *Williams v. Dekalb County*, 582 F.2d 2 (5th Cir.), modifying 577 F.2d 248 (5th Cir. 1978); *Johnson v. Baylor College of Medicine, supra.* No burden shifts to the employer until and unless the plaintiff makes "a showing of purposeful discrimination." *Grigsby v. North Mississippi Medical Center, Inc.*, 586 F.2d 457, 461 (5th Cir. 1978); *Williams v. Dekalb County, supra.*

15. For the same reasons stated above, Plaintiffs did not prove a case of purposeful discrimination with respect to their lack of promotions.

D. *Conclusion*

16. Goodyear did not discriminate against Plaintiffs because of their race and did not violate either Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* or 42 U.S.C. § 1981. Moreover, Goodyear did not discriminate against blacks as a class and did not violate either Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.* or 42 U.S.C. § 1981 with respect to supervisory promotions from November 8, 1969 to date.

17. Accordingly, the Court concludes that Plaintiffs have failed to establish that they, or the class they represent, were discriminated against because they are black and have thereby failed to establish any basis for recovery of monetary or equitable relief.

In the event any of the foregoing Findings of Fact also constitute Conclusions of Law, they are adopted as such. In the event that any of the foregoing Conclusions of Law also constitute Findings of Fact, they are adopted as such.

Done at Houston, Texas, this 14th day of April, 1980.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

NO. 80-1542

Summary Calendar

OTIS M. BAY AND
CHARLES H. BEAN,
Plaintiffs-Appellants,

versus

GOODYEAR TIRE & RUBBER CO.,
HOUSTON CHEMICAL PLANT, ETC.,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Texas

(February 18, 1981)

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

PER CURIAM:

Otis M. Bay and Charles H. Bean brought this civil rights action—pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* and 42 U.S.C. § 1981—against their employer, The Goodyear Tire & Rubber Company. They alleged that Goodyear refused to promote them to supervisory positions at the Houston Chemical Plant because of their race. In addition, the

district court certified the suit as a class action, the class being composed of all black employees who were denied supervisory positions because of their race or color, within the specified time period. After a bench trial, the district court found that neither Bay nor Bean were denied promotions on the basis of their race. The court further found that Goodyear did not maintain a supervisory promotional system that discriminated against blacks as a class. The plaintiffs now appeal that decision. We affirm the judgment of the district court.

The plaintiffs' argument on appeal is limited to their dissatisfaction with the district court's factual determinations that Goodyear's promotional policies did not have a discriminatory impact on the individual plaintiffs, nor on the class that the individual plaintiffs represent. After reviewing the record we find that there is ample support for the district court's findings, and we cannot declare them to be clearly erroneous.

AFFIRMED.

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FILED
AUG 20 1981
ALEXANDER L. STEVA
CLERK

NO. 81-102

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

OTIS M. BAY and CHARLES H. BEAN,
Petitioners

v.

THE GOODYEAR TIRE & RUBBER COMPANY,
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RESTATEMENT OF QUESTION PRESENTED

Whether a promotional system which contains some subjectivity but which had no adverse impact upon black employees violates Title VII of the Civil Rights Act of 1964?

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Respondent, The Goodyear Tire & Rubber Company, certifies that the following list of persons have an interest in the outcome of this case.

Otis Bay and Charles Bean,
Petitioners

The Goodyear Tire & Rubber Company,
Respondent.[1]

Respectfully submitted,

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1. The United States subsidiaries of The Goodyear Tire & Rubber Company include Cosmoflex Inc.; Goodyear Aerospace Corp.; Goodyear Atomic Corp.; The Goodyear Bank; Goodyear Farms; Goodyear Financial Corp.; Goodyear International Corp.; Goodyear International Export Corp.; Goodyear International Finance Corp.; The Goodyear Rubber Plantations Co.; Goodyear Western Hemisphere Corp.; Granford Manufacturing Inc.; Lee Tire & Rubber Co.; Litchfield Park Properties; Motor Wheel Corp.; and Reneer Films Corp.

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NO. 81-102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

OTIS M. BAY and CHARLES H. BEAN,
Petitioners

v.

THE GOODYEAR TIRE & RUBBER COMPANY,
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

The statement of facts in the Petition is so skewed toward Petitioners' view that Respondent does not believe it affords the Court a fair view of this case. The Petition omits critical facts and misstates others.

The evidence on which the District Court based its judgment for Respondent is set out fully in the Findings of Fact and Conclusions of Law. (Pet. App. AA-1 to 46). The Fifth Circuit Court of Appeals found "ample" support for the District Court's findings upon review of the

record and affirmed the District Court's judgment. (Pet. App. B-2). The Court of Appeals viewed Petitioners as having limited themselves on appeal "to their dissatisfaction with the district court's factual determinations that Goodyear's promotional policies did not have a discriminatory impact upon the individual plaintiffs, nor on the class . . ." (*Id.*)

This action involves the question whether Respondent discriminated against black employees in the awarding of supervisory promotions during the period from November 8, 1969 to March, 1980, the date of trial. Goodyear's Houston plant is organized into several distinct departments. Candidates for promotions to supervisory jobs come from the ranks of hourly and salaried non-exempt employees in each department. (Pet. App. AA-3). An employee is only eligible for a supervisory promotion if a vacancy occurs in the department in which he is working. Employees have access to non-supervisory jobs in all departments through a contractual bidding and job posting system. Employees who bid are awarded posted bargaining unit jobs based on seniority. (Pet. App. AA-30).

During the time period relevant to this case (1969-80), a total of 37 supervisory promotions in 6 different departments occurred. Of these 37 promotions, 8 (or 21.6%) went to black employees. (Pet. App. AA-29). In addition, Goodyear made 3 offers of supervisory promotions to black employees who refused the offers. No white employee refused a promotion. If total supervisory promotion offers are calculated, blacks received 27.5% of all offers. During the time period at issue, the percentage of blacks in Goodyear's work force increased from 11.7% (1969) to 19.5% (1979). (*Id.*)

Statistical analyses of each department by racial composition, to determine the number of promotions one might expect blacks to receive based purely on departmental representation in each year, resulted in a determination that blacks were awarded *more* than their "expected" number of supervisory promotions. (Pet. App. AA-29 to 33).

In the two departments with the most promotions, Departments 1300 and 1400, with fourteen and six promotions respectively, *no* white employee entering the departments after November, 1961 had been promoted to supervisor. Seven black employees, all with departmental entry dates after 1961, had received supervisory promotions. (Pet. App. AA-29, AA-31).

The District Court found Goodyear had not discriminated against black employees with respect to supervisory promotions during the years from November 8, 1969 to date of trial.[1] (Pet. App. AA-34). The Court of Appeals found "ample evidence" in the record to support that conclusion.

REASONS FOR DENYING THE PETITION

A. The Questions Presented Were Not Raised or Considered Below.

The questions presented by the Petition were not considered on appeal before the Court of Appeals. There the petitioners offered the following Statement of Issues:

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1. The reference in the District Court's finding number 14 to "November 8, 1979" is a typographical error, for throughout the findings the reference is to November 8, 1969. (Pet. App. AA-28-45)

1. Whether Appellants were denied a promotion because of their race.

2. Whether Appellee employs a promotional system which discriminates against blacks because of their race?

Appellants Brief at ii.

The Court of Appeals reviewed the arguments presented by Petitioners and held:

> The plaintiffs' argument on appeal is limited to their dissatisfaction with the district court's factual determinations that Goodyear's promotional policies did not have a discriminatory impact on the individual plaintiffs, nor on the class that the individual plaintiffs represent. After reviewing the record we find that there is ample evidence for the district court's findings, and we cannot declare them to be clearly erroneous.

Pet. App. B-2.

Here, Petitioners have raised issues unrelated to factual determinations, preferring now to concentrate entirely on new legal issues such as whether subjectivity in promotional decisions is a *per se* violation of Title VII regardless of impact. Petitioners have never previously argued that the District Court excluded employment decisions made during the liability period.

This Court has repeatedly refused to consider issues "neither raised before nor considered by the Court of Appeals." E.g., *Adickes v. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970). This result has also been reached where the point may have been raised below but was not dis-

cussed in the appellate court's opinion. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975). See also, *Neely v. Eby Construction Co.*, 386 U.S. 317, 330 (1967). No exceptional circumstances are present here to warrant waiver of this requirement. See *Stone v. Powell*, 428 U.S. 465, 481, n.15 (1976).

B. The Judgment Below Is Amply Supported In Both Fact and Law and Presents No Issue for Review By This Court. (Response to Question No. 1 of the Petition)

1. There has been no adverse impact.

The Petition carefully avoids any reference to the actual *results* of Goodyear's promotional policies. That omission is not surprising.

Of the 37 supervisory promotions at issue, blacks received 8, and were offered 3 more. Black employees received 21.6% of the promotions, and 27.5% of the offers, yet the percentage of black employees in the work force ranged from 11.7% (1969) to 19.5% (1979). Accordingly, during the liability period blacks received a higher percentage of promotions than their representation in the work force.

Any fair consideration of trends and promotion rates of employees by race must be done in the context of relevant pools from which employees are drawn to fill the vacancies. *Albemarle Paper Company v. Moody*, 422 U.S. 405, 425 (1975). In *Mayor of City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 621 (1974) this Court found that the failure to refer to the relevant labor pool rendered the statistics "meaningless".

Since at Goodyear's Houston Plant the supervisors are selected only from the ranks of the hourly and salaried non-exempt employees in the department in which the vacancy occurs, the pool of candidates for each promotion is employees in the department where the supervisory vacancy occurs.

As found by the District Court, if one examines the supervisory promotions based simply upon what one might statistically expect to occur based on the proportionate makeup of the nonsupervisory workforce within the departments, in the aggregate one would expect blacks to have received nearly 6 promotions based on their representation in the pools from which supervisors are drawn. As stated, blacks actually received 8 promotions (11 offers of promotion) during the period. The District Court carefully summarized the statistical evidence and concluded there was no adverse impact upon blacks from Goodyear's supervisory promotional policies. (Pet. App. AA-33).

In summary, the promotional system Petitioners condemn has had no adverse impact on black employees. Petitioners' first question is really an attempt to have this Court review the District Court's fact findings, which the Court of Appeals affirmed. It presents no substantial question of law for this Court's consideration.

2. Subjectivity in promotional decision-making is not a *per se* violation.

Having failed to show any adverse impact upon blacks, Petitioners are before this Court urging that the mere presence of subjectivity in a promotion process is, regardless of effect, a violation of Title VII. Respondent believes

Petitioners' argument in this regard to border on the frivolous.

Subjectivity cannot be completely expunged from any promotional or hiring decision. *Davis v. Board of School Commissioners of Mobile County*, 600 F.2d 470, modified 616 F.2d 893 (5th Cir. 1979); *Hereford v. Huntsville Board of Education*, 574 F.2d 268, 270 (5th Cir. 1978). See also, *Ramirez v. Hofheinz*, 619 F.2d 442 (5th Cir. 1980). Goodyear does in fact utilize some objective criteria such as departmental experience in making promotional decisions. (Pet. App. AA-40).

Petitioners' obsession with the subjective aspects of the Goodyear system is misplaced. The subjectivity of a system is irrelevant if there is no resulting disparate impact. *Hester v. Southern Ry.*, 497 F.2d 1374, 1381 (5th Cir. 1981). See also, *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419 (5th Cir. 1980) vacated on other grounds, 101 S.Ct. 1967 (1981); *Rogers v. International Paper Co.*, 510 F.2d 1340, 1345-46 (8th Cir. 1975).

This Court has stated that the use of subjective criteria is not susceptible to challenge at all unless it can first be shown that the criteria select for "promotion in a racial pattern significantly different from that of the pool of [candidates]." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). Both the District Court and the Court of Appeals found no such showing here.

Petitioners' incantation of *Rowe v. General Motors Corporation*, 457 F.2d 348 (5th Cir. 1972) is of no value here. *Rowe* stands only for the proposition that a promotion system which incorporates subjective procedures may be discriminatory if it operates to exclude

a disproportionate number of blacks from promotions. In *Rowe* the court first looked at the gross disparity in the numbers of blacks being promoted and transferred. Only then did it address the subjectivity of the system as the possible cause of the disparate impact upon blacks. *Accord, Fisher v. Proctor & Gamble Mfg. Co.*, 613 F.2d 527 (5th Cir. 1980). Only after disparate impact was found did the court criticize subjectivity.

The predicate of disparate impact is absent here. Goodyear promoted a greater percentage of black employees than their representational percentage in both the work force as a whole and in each department. The impact of Goodyear's policies on blacks was perhaps disparate, but the impact was favorable to blacks, not adverse.

Petitioners really prefer to have this Court create some guidelines which every employer in the nation must follow in its employment practices. However, the Court has wisely recognized the pitfalls of that approach. "Courts are generally less competent than employers to restructure business practices." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978). The touchstone must logically be that explained by the District Court:

> Most importantly, this Court must consider the result of Goodyear's promotional practices. Regardless of whether objective or subjective factors were utilized, did they result in an adverse treatment or impact upon black employees? The answer here is "no." Accordingly, the mere presence of subjective procedures in the promotional process is not discriminatory. *Jenkins v. Caddo-Bossier Association, supra.*

Pet. App. AA-41.

C. All Promotions Made During The Liability Period Were Considered Below. (Response to Question No. 2 of the Petition)

Petitioner here argues, for the very first time, that supervisory promotions made during the liability period were not considered by the courts below. That argument is not based on fact.

As stated above, there were a total of 37 promotions made in the period of November 8, 1969 to the date of trial. Petitioners do not dispute that number. The District Court used that figure in arriving at its conclusion that blacks had received at least their proportionate share of promotions. (Pet. App. AA-3, 28-29). The District Court found that Petitioners failed to prove discrimination in promotions from November 8, 1969 to the date of trial. (Pet. App. AA-45). The Court of Appeals affirmed. Petitioners have not previously, nor do they now, identify a single promotion from November 8, 1969 to trial that the District Court excluded from consideration. There were none.

Petitioners really seek to have this Court retry the action and hold Goodyear liable for a lack of black promotions *prior* to November 8, 1969. However, as Petitioners admit, the issue at trial was not events occurring prior to November 8, 1969, but only promotions made thereafter.[2] As the District Court stated:

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2. It should be noted that there was no allegation of discriminatory hiring or initial assignment made in the trial court. As stated previously, all employees were free to transfer (bid) to other departments based only on seniority.

> The focus here necessarily must be on what happened during the liability period from November 8, 1969 to date. How many supervisory promotional opportunities became available? Who got them? In other words did Goodyear's supervisory promotional policies prevent black employees from receiving their proportionate share of promotions?

Pet. App. A-28.

This Court has repeatedly stressed the necessity of considering employment decisions which occurred during the time frame relevant to the lawsuit. *Hazelwood School District v. United States,* 433 U.S. 299, 309 (1977); *United Airlines, Inc. v. Evans,* 431 U.S. 553 (1977). See also, *Ste. Marie v. Eastern R. R. Assn.,* ____F.2d ____, 26 FEP 167, 174 (2nd Cir. 1981); *Movement for Opportunity and Equality v. General Motors Corp.,* 622 F.2d 1235, 1245 (7th Cir. 1980). Consistent with this authority, all 37 supervisory promotions made from November 8, 1969 to the date of trial were considered by the District Court.

Petitioners offer only the completely unsubstantiated assertion that the lower courts "pick[ed] an arbitrary point within that period and exclude[d] other points." Petition at 14-15. The District Court excluded no period of time or promotion from November 8, 1969 to the date of trial, as evidenced by the Findings and Conclusions. Petitioners' assertion to the contrary misrepresents the facts as found and affirmed below.

CONCLUSION

If ever there were a case that does not deserve consideration by the Supreme Court, this is it.

This case was correctly decided on the facts and law in the lower courts. The questions presented by Petitioners provide no basis for this Court's discretionary powers of review, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

Original Signed By RICHARD R. BRANN

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Response to Petition for Writ of Certiorari have been mailed to the Attorney of Record for Petitioners on this the 19th day of August, 1981.

RICHARD R. BRANN